Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Implementation of the Telecommunications Act of 1996	CC Docket No. 96-238
Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers	

COMMENTS OF ICG TELECOM GROUP

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SUMMARY

ICG applauds the Commission's effort to streamline the formal complaint process to meet the mandated statutory complaint deadlines required by the Telecommunications Act of 1996. Change in the process is not only needed to meet the required deadlines, but will also go far to resolve long-standing problems of delay which have frustrated the industry and the Commission. With limited changes, the NPRM can accomplish this goal.

The initiative to encourage pre-complaint resolutions may resolve some disputes early on and eliminate the necessity to file complaints. However, several clarifications are needed.

First, the Commission must ensure that the requirement of following pre-complaint procedures does not become a time-consuming process that allows carriers to effectively reject a complainant's claims while simply interposing additional delay. The experience of CLECs in interconnection negotiations validates this concern.

Because prospective defendants have a natural incentive to use pre-complaint procedures to delay the filing of complaints, pre-filing procedures have an inherent bias against complainants. The Commission must be willing to impose strong sanctions on defendants who use pre-complaint procedures to thwart competitors and competition.

Further, CLECs in particular, but other telecommunications providers as well, will have on-going relationships with ILECs.

CLECs have been through the interconnection agreement negotiation (and in many cases the arbitration) process as well as having daily contact through operations personnel as interconnection agreements are implemented. ILECs generally have a keen understanding of the needs of CLECs when CLECs make requests for service(s), and protracted discussions should be unnecessary.

The Commission must also recognize that good faith pre-complaint "settlement" efforts do not mean acquiescence or compromise of a party's rights. The Commission's commendable and vigorous efforts to implement the competitive objectives of the Telecommunications Act have conferred important rights designed to stimulate robust competition. Complainants must not be compelled to "settle" their claims as a basis for asserting their statutory rights. It should be enough that the complainant has made a clear demand for relief from the defendant and the defendant has explicitly denied or effectively denied relief.

The proposed pleading requirements implement desirable changes that should generate the development of essential information at an earlier time. The Commission must clarify that defendants must state fully the facts and basis that support their denials and promptly produce the documents referred to in the answer. The proposed changes providing for expedited service of the complaint will also be instrumental in reaching mandated deadlines.

These commendable improvements, however, are not a substitute

for an ordered and expedited discovery process. While the Commission should limit burdensome discovery and speculative litigation, there are some discriminatory practices that must be pleaded on information and belief and that can only be uncovered through discovery. CLECs will see the results of these practices in the marketplace. But as a practical matter, customers and end users who are the beneficiaries of an ILEC's discriminatory rates or practices will not volunteer information for an FCC complaint that will result in higher rates or less favorable treatment for them. The only practical way to uncover these practices will be the discovery of ILEC records.

While the Commission should continue to allow discovery as a matter of right, the Commission can assure an accurate and complete record by accelerating the discovery process as well as by expeditiously denying burdensome discovery requests.

In providing for cease and desist orders and other interim relief pending final resolution of complaints, Congress was attempting to ensure that competition would not be suppressed by carrier delays in providing service. The heavy burden imposed on parties seeking an injunction is not warranted for parties seeking interim relief. The Commission should allow parties interim relief where the party demonstrates that it will launch a "substantial challenge" to the carrier practice and a failure to grant relief will injure competition or undermine the competitive position of

the party seeking relief to the benefit of the carrier denying relief. This is particularly so in the case of CLECs, who generally are only attempting to purchase a service for which the CLEC will pay.

There are a number of other refinements to the proposed rules that should be adopted. These include providing that bifurcated damage proceedings will be resolved expeditiously, requiring notification of motions prior to filing, requiring early discovery and disposing of discovery requests at the status conference, and standardized briefing schedules.

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COMMENTS OF ICG TELECOM GROUP

ICG Telecom Group, a subsidiary of ICG Communications, Inc. submits the following comments in response to the Commission's Notice of Proposed Rulemaking (the "NPRM") issued on November 27, 1996, in the above referenced proceeding. ICG is the third largest "facilities- based" competitive local exchange carrier ("CLEC").

CLECs, and other competitive or new service providers relying on Section 251 to gain access to incumbent local exchange carrier ("ILEC") (and in particular Bell Operating Company ("BOC") networks) have a unique interest in the Commission's complaint process. The Telecommunications Act of 1996 has accorded these entrants new rights by requiring ILECs to provide new kinds of access and interconnection to their networks. It is only the

compulsion of the Telecommunications Act, and in the case of the BOCs also the prospect of entry into providing in-region interLATA services pursuant to Section 271, that has moved the ILECs to accord the access and interconnection to their networks that they have historically denied to competitors and new service providers. Competitors and new services providers such as ICG are already very dependent, and once the RBOCs have achieved clearance to enter the in-region interLATA services market will be even more dependent, on the Commission's complaint process to assert their rights under the Telecommunications Act. Accordingly, ICG has a vital interest in the outcome of this proceeding.

I. ICG SUPPORTS THE COMMISSION'S ATTEMPT TO STREAMLINE PROCEDURES FOR PROCESSING FORMAL COMPLAINTS

The NPRM is a laudable effort to streamline the Commission's complaint process. ICG recognizes that delay has been a problem for all parties in the past and that given the Act's mandated resolution deadlines, it is essential to develop an expedited process to bring formal complaints to finality as soon as possible. In requiring expedited processing of complaints, Congress recognized that the inability to obtain speedy resolution of grievances against carriers that resist the competitive mandates of the Telecommunications Act of 1996 is as effective a barrier to the

emergence of competition as the carrier's denial of the rights in the first instance.

The ability to obtain relief under the Commission's complaint procedures is thus a vital component for achieving the competitive objectives of the Telecommunications Act of 1996. It is therefore crucial that in providing for speedy resolution of complaints, the Commission not undermine the ability to bring and sustain complaints in the first instance. The process of initiating and prosecuting complaints cannot be so difficult that it discourages rather than facilitates the presentation of claims to the Commission.

II. COMMENTS ON SPECIFIC PROPOSALS

ICG offers the following comments on the specific proposals in the NPRM. Except as discussed in the following comments, ICG generally endorses the changes in the rules to facilitate meeting the statutorily mandated complaint resolution deadlines.

A. Pre-Complaint Negotiations

ICG supports the Commission's initiative to encourage the settlement negotiating process as a pre-filing requirement. While ICG believes there is merit to the proposal to require parties to attempt to reach a resolution of their grievances prior to filing a complaint, there are two areas that require some clarification.

First, the requirement that a complainant discuss the "possibility of a good faith settlement with the defendant" (NPRM at ¶ 28) must not become a requirement for exhaustive negotiations. Any such requirement will lead to abuses which must be contained. For example, requests for service from carriers can be unduly delayed by protracted negotiations that never reach finality, and if the parties are required to negotiate to impasse prior to filing a complaint, grievances -- the resolution of which would serve the industry and the public -- will not be concluded in a timely manner. Indeed, through a process of delay, the carrier can effectively reject the complainant's claim without explicitly denying it.

The experience of many CLEC in negotiating interconnection agreements under Section 251 of the Telecommunications Act validates this concern. The 135 days before arbitration can be invoked under Section 252 is frequently spent in a seemingly endless string of "take backs" for decision, the need to gather more information, etc., perhaps not quite meeting the bad faith standard, but sufficient to drag out the negotiations and delay the ability of the CLEC to begin to offer services. In one case, ICG was informed that as of January, 1997, almost a year after enactment of the Telecommunications Act of 1996, one ILEC could

propose no rates for interconnection, unbundled elements, etc. In fact, that ILEC indicated that even as late as January 1997, it was not prepared to respond to rates proposed by ICG in the context of interconnection negotiations.

The Commission must recognize that any pre-complaint discussion requirement will require the Commission to take strong actions against defendants who do not engage in good faith discussions with complainants. The Commission has available to it ready sanctions against a complainant that fails to follow any pre-complaint procedures. The Commission can dismiss the Complaint.[1] Similarly, the Commission can make a finding against the complainant on a factual issue, a potent remedy since any failure in a complainant's chain of proof can mean a failure to satisfy the complainant's burden of proof. Thus, complainants will be highly motivated to follow the Commission procedures as a basis for asserting their rights.

By contrast, potential defendants have every motivation to delay, to be unresponsive and to thwart the complainant's efforts to meet the Commission's requirements. There is thus a built-in

[1]However, any dismissal for failure to follow a procedural prerequisite should be without prejudice to refiling. A procedural defect is not sufficient to warrant dismissal with prejudice.

bias in favor of the defendant in requiring pre-complaint procedures. To overcome this bias, and the natural incentive of defendants, the Commission must be willing to impose post-complaint sanctions on defendants who fail to be responsive to complainants attempting to satisfy the pre-complaint procedures. Otherwise, the pre-complaint procedures become simply a tool for defendants to use to delay and defeat complainants efforts to assert their rights.

Particularly in the case of CLECs, anything more than minimal pre-complaint procedures is unnecessary because the ILEC will have familiarity with the CLEC's requirements and needs. The CLEC and ILEC will have a long history of dealing with each other. Under Section 251 of the Telecommunications Act, the CLEC will have initiated a request for interconnection. An extended period of negotiation, up to 160 days, will have followed under Section 252. If the CLEC and ILEC reached agreement within the 160 day period, they would have then been through a state review process; if no agreement was reached, they would have been through an arbitration hearing, a renegotiation based on the results of the arbitration, and a review of the agreement reached as a result of the arbitration. Most CLEC-ILEC agreements contain escalation procedures, so that any dispute will already have been thoroughly vetted.

Furthermore, the CLEC and the carrier will likely have an ongoing relationship. Technicians and operations personnel are likely to be in steady contact as interconnection agreements are implemented. Further, CLEC complaints are likely to request specific relief, such as access to an unbundled element, or a determination of technical feasibility.

In these circumstances, the Commission must be explicit that the course of dealing between the parties can be, and often is, sufficient to satisfy the requirement of pre-complaint discussion so long as there has been a clear demand of the carrier (e.g., for a specific unbundled element, interconnection at a particular point, etc.) and a denial or effective rejection of the request.

A related issue, and a second area requiring clarification, is that "settlement" does not mean acquiescence or compromise of a party's rights. The Commission has, with commendable vigor, attempted to implement and interpret the requirements of the Telecommunications Act of 1996 in a manner that fosters competition. See, e.g., Implementation of the Local Competition Provisions In the Telecommunications Act of 1996, CC Dkt. No. 96-98, FCC 96-325 (rel. Aug. 8, 1996)("Interconnection Order"). Both the Telecommunications Act of 1996 and the Commission's Order implementing it have conferred clear rights upon new entrants,

rights designed to bring the benefits of local exchange competition to consumers. In addressing the requirements for speedy resolution of complaints, the Commission cannot require CLECs or other complainants to "settle away" these rights. While it is reasonable for the Commission to require a prospective complainant to make to the prospective defendant a clear statement of complainant's claim and the basis for asserting the right to relief, the complainant cannot be compelled to attempt to "settle" the claim as a prerequisite to asserting the right.

In light of the foregoing discussion, the Commission should amend proposed Section 1.721(a)(8) to provide that:

> Certification that the complainant has made a clear demand for relief from the defendant and defendant has explicitly denied or effectively rejected the request.[2]

Further, post-filing efforts to facilitate settlement should also be encouraged. At all steps during the complaint process, the staff will have opportunities to encourage and foster settlement. For example, in state and federal court litigation, judges and magistrate judges frequently take the initiative on occasions where

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[2]This proposed text, together with three additional proposed text changes are included in the Appendix attached hereto. Other proposed text changes addressed in these comments are requested deletions and are not included in the Appendix.

the parties appear, to urge the resolution of some or all of the disputes between them. These occasions occur several times during the course of the litigation process -- at the initial scheduling/ status conference; during hearings on discovery disputes; and at the pretrial conference. Like opportunities are available to the staff during the complaint process. Recognizing that the staff must remain neutral, staff can nevertheless move the proceeding toward the ultimate end result by suggesting, urging and fostering reasonable decisions by the parties during the process. Continued input by the staff, directed toward the possible settlement of some or all issues in dispute, will doubtless result in the early resolution of formal complaints.

B. Proposed Pleading Requirements

The proposed pleading requirements provide that the complaint and answer contain much greater detail than is currently required. ICG agrees generally with these more detailed pleading requirements. The proposed changes require the complainant to provide (1) a full recitation of facts, with supporting affidavits and complete documentation; (2) a copy of or detailed description of all relevant documents, data compilation and tangible things; (3) a list of individuals likely to have discoverable information (with identity of subject of such information); (4) the identity of

the communications, services, facilities or conduct complained about, together with the nature of the injury; (5) specific relief sought; (6) certification that the possibility of settlement had previously been discussed with the defendant;[3] (7) statement concerning the filing of other suits or administrative proceedings based on the same cause of action; (8) completed "Formal Complaint Intake Form."

Under the proposed rules, defendant carriers are required to provide in their answers: (1) specific admissions or denials of each averment in the complaint; (2) a copy of or description of all relevant documents, data compilations and tangible things; (3) the identity of each individual likely to have discoverable information.[4] It is not clear however that defendant common carriers are required to make full and complete explanations of the

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[3]This requirement is subject to the discussion in Section II(A) of these comments.

[4]It should be noted here that the new pleading rule requires only the identity of relevant documents and witnesses. The new rules, as a whole, make no provision for the production of documents and access to individual witnesses by interrogatory or deposition. Clearly the proposed changes contemplate the production of documents identified and access to the information possessed by the individuals identified as having knowledge of relevant facts. The proposed rules should unequivocally provide for the production of the information as proposed in the attached Appendix.

basis for any specific denials included in their answers and their affirmative defenses. This is certainly contemplated in the NPRM (see NPRM, paragraph 37), but is insufficiently addressed by proposed Section 1.724. The attached language is proposed to make clear that defendant carriers are required to include in their answers specific alternative facts for each specific denial.

C. Service

The rule changes requiring the simultaneous service of complaints on the defendant, the Commission and the appropriate staff will eliminate a long standing bottleneck in processing formal complaints. The service of pleadings should be by hand or overnight mail, which would be the most efficient time-saving method of perfecting service, and, as a concomitant, there should be no time allowance for service by U.S. mail for any pleading or other filing permitted under the proposed rules.

D. Complaints Based on Information and Belief and the Relation to Discovery

The NPRM at paragraph 38 seeks comment on the suggestion that "complaints that rely solely on assertions based solely on information and belief should be prohibited. (Emphasis added.) Paragraph 38 later refers to factual "assertions based on information and belief" as possibly not being useful in the

determination of the ultimate decision on the merits of complaints and goes on to seek comment on "prohibiting such assertions." It is unclear therefore, whether the Commission is proposing to eliminate complaints based solely on information and belief or whether the Commission seeks to eliminate complaints containing any assertions based on information and belief.

ICG recognizes the need for the Commission to limit "speculative" litigation based solely on information and belief that relies entirely on discovery to develop the facts necessary to prove a claim. But discovery and the ability to rely on some allegations based on information and belief are of special importance to CLECs. Many of the practices that will be of concern to CLECs are likely to involve claims of discrimination arising under Sections 202,251, and 271 of the Act, unreasonable practices arising under Section 201, and other failures to comply with Section 251. These claims, and particularly claims of discrimination, inherently require some knowledge of the services the ILEC is making available to competitors or other telecommunications services providers.

This information usually will not be available to a complainant. The complainant may observe the results of these discriminations only in the marketplace. Where the ILEC in

question is discriminating in its own favor (or in favor of a service provider or competitor other than the complainant), the ILEC will not divulge the arrangement; nor would another party receiving the benefit of the discrimination, such as a customer that obtains an unlawfully low price for service from the ILEC. That customer surely has no incentive to participate in or support an FCC complaint that, if successful, may result in a rate increase for that customer. Similarly, if an ILEC provides a customer/end user more favorable service intervals than provided to a CLEC, it will be very difficult to obtain information meeting the threshold the Commission seems to be demanding.[5]

The only way to plead this discrimination would be on the basis of information and belief, and then to seek ILEC records in discovery to verify the discrimination. Even if the CLEC pleaded on the basis of one end user/customer's affidavit that there had been discrimination, it is not clear that would satisfy the Commission standards to show discrimination or be sufficient to sustain damages. But it is surely unrealistic to expect a CLEC to

[5]Indeed CLECs are likely to be reluctant to involve even customers who give the CLEC information. To require the CLEC to attempt to implicate a potential customer/end user in litigation by relying on statements from the customer is unrealistic (even assuming the customer revealed the ILEC's service levels) since involving the customer entails a permanent loss of goodwill.

be able to gather evidence of a pattern of discrimination. Such proof would have to be based on discovery of the ILEC service records and could, in the first instance, be alleged only on information and belief.[6]

In sum, the nature of the claims to be asserted by CLECs demands that there be some flexibility in asserting claims on information and belief and some opportunity for discovery as a matter of right to gather critical factual information that generally would be available to complainants prior to litigation.

ICG has considered whether it is possible to propose a standard somewhat between the NPRM's proposed outright prohibition on any allegations on information and belief and complaints based solely on information and belief. A formulation that is not so vague and general as to raise as many problems as it resolves is not immediately apparent. For these reasons ICG believes the Commission should continue to allow complaints relying on allegations based on information and belief.

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[6]ICG does recognize that it might be necessary to limit discovery to particular named occurrences, rather than allowing broad brush requests for information such as "all service records showing intervals for all service requests," unless there were enough evidence to justify broader discovery.

E. Discovery (Continued)

As is apparent from the foregoing, ICG believes that attempts to further limit discovery will inhibit the ability of complainants to assert their rights. Discovery is not the enemy of prompt disposition of complaints. Indeed, in many cases discovery will be critical to resolution of a complaint, and discovery will often enhance the opportunity for settlement. As discussed above, for example, successful discrimination claims, as a practical matter, are often dependent upon complainant's ability to establish defendant's practices with complainant's competitors or other service providers.

ICG believes there must be some discovery as a matter of right. Without the ability to discover, the parties and the Commission will be forced to rely on disclosures made only in the initial pleadings and will have no vehicle to test the accuracy or the completeness of those disclosures without discovery. This, of course, could result in decisions based on inadequate and inaccurate records, all to the detriment of industry participants and the public.

Moreover, the proposal to leave to the discretion of the staff the decision as to the necessity for discovery, could also

prolong the complaint resolution process.[7] Complainants will almost always require some discovery, and will have to seek it by motion or at the first status conference. The result will be additional motions in most cases, requiring additional expenditures of time by the parties and the staff, and will no doubt lead to inconsistent rulings on the need for discovery.[8]

Rather than seeking to formally limit the scope of discovery, the most expeditious approach to assuring an accurate and complete record is to continue to permit discovery as a matter of right, but to accelerate the discovery process. The Commission should change the schedule for filing discovery to require the parties to file contemporaneous discovery requests 10 days after the complaint is filed, with objections to be filed five days before the status

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[7]It should be noted here that the staff has and should retain continuing discretion to direct the disclosure and production of additional information that the staff believes is necessary to fulfill the Commission's independent agency obligations to fully resolve complaints. Unlike litigation in state and federal court, where the judge has no obligation to pursue facts that the parties do not put in the record, the Commission has an independent public interest responsibility in resolving allegations raised in a formal complaint.

[8]To avoid inconsistent rulings and expedite the resolution of disputes over material facts, such disputes should be referred to an administrative law judge for expedited resolution.

conference.[9] This schedule would permit the parties to make discovery early in the proceeding and the staff could resolve disputes at the proposed status conference.[10]

G. Status Conference

The proposed changes in the schedule requiring the initial status conference to be held in 10 business days after the complaint is filed will clearly be necessary to meet mandatory resolution deadlines. The 24 hour deadline to submit a joint proposed order memorializing oral rulings at the conference dictates that a party should have the option to tape record the entire proceeding, however, rather than limit the recording to the presiding officer's summary of the oral rulings. This will eliminate disputes between the parties concerning the nuances of what was said during the course of the conference and will

[9]In addition, complainant would be able to supplement its discovery based on material contained in the answer within five days of receiving the answer. Objections to the supplemental discovery would be heard at the status conference.

[10]Whatever the Commission's disposition of discovery of right in the substantive phase of a case, when a complainant bifurcates the damages issue through the voluntary supplemental complaint process, the discovery rules must permit liberal discovery on the issue of damages in the supplemental complaint process. Proof of damages, such as lost profits from a transaction lost to a carrier because of a violation, for example, will always require information that can be ascertained only from defendants.

facilitate drafting the joint proposed order.

H. Cease and Desist Orders

A party should not have to meet the stringent standards for a stay or injunction in order to obtain a cease and desist order pending final resolution. The requirement for a showing of no substantial injury to other parties and furtherance of the public interest should remain. However, as to the other factors, the purpose of the Telecom Act of 1996 dictates a departure from the conventional stay standard. By providing for interim relief, Congress was attempting to ensure that carrier refusals to provide service would not suppress competition by delay. Accordingly, it is important that the Commission, if not favoring interim relief, at least not impose too stringent a standard on parties seeking such relief.

The "likelihood of success" factor inherently favors the status quo, requiring that the complainant demonstrate that it more likely than not will prevail on the merits. As discussed above, however, it was Congress's intent in enacting the Telecom Act of 1996 to *alter* the status quo by stimulating vigorous competition and creating an expedited means of fostering effective competition. Thus, instead of "likelihood of success," particularly in those cases where complainant is purchasing a carrier service or

proposing to purchase a carrier service or unbundled element or seeking interconnection, the complainant should only have to establish that the complainant has a "substantial challenge" to a carrier defendant's practices.[11]

Similarly, irreparable injury is also an inappropriate standard in light of the goal of the Telecom Act of 1996 to foster and protect competition. The Commission and the courts have construed the irreparable injury standard very stringently, requiring a party seeking a stay to demonstrate that it is likely to suffer imminent and noncompensable loss absent grant of the stay. Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985). Here, however, the question is not whether the particular complainant will necessarily suffer an uncompensable loss. Instead, the touchstone here must be whether or not competition will suffer if the cease and desist order is not granted. This encompasses from more than noncompensable injury. Therefore,

[11]The ability to launch a "substantial challenge" to a Commission order is the standard for expedited review of Commission orders in the U.S. Court of Appeals. See D.C. Circuit Handbook of Practice and Internal Procedures, § VIII.B. A standard that justifies expedited review in the U.S. Court of Appeals similarly justifies expedited relief in the form of a cease and desist order pending final resolution.